No. 92-1450

In The

Supreme Court of the United States

October Term, 1993

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation,

Petitioners,

v.

CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA) IN SUPPORT OF RESPONDENTS

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I. INTEREST OF THE AMICUS CURIAE

The National Employment Lawyers Association is a national bar association of over 1,700 lawyers who regularly represent employees in employment-related disputes. Founded in 1985 and headquartered in San Francisco, NELA members comprise a large segment of the leaders of the bar specializing in employment law on behalf of employees. NELA members regularly handle cases involving government employment terminations

stemming from an employee's exercise of constitutional First Amendment privileges.

In light of its interest in the application of employment law, NELA has previously filed amicus briefs with this Court, as well as briefs before the Circuit Courts of Appeal and various State Supreme Courts.

Because of its practical experience with the issues at bar, NELA is well suited to brief this Court on the importance of the issues and the practical effects of the Court's decision beyond the immediate concerns of the parties.

The written consent of all parties have been filed with the Clerk of this Court.

II. SUMMARY OF THE ARGUMENT

This case presents the Court with the opportunity to clarify the standards to be applied when analyzing public employer retaliation against public employees who engage in First Amendment freedom of expression.

NELA recommends herein that the Court adopt the rationale applied by the Seventh Circuit in the instant case and reject the Petitioners' overly narrow interpretations of this Court's decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Meyers*, 461 U.S. 138 (1983). NELA also respectfully proposes that the unequivocal language of the First Amendment must be interpreted so as to place the burden on the state to justify any encroachment of free expression it may wish to undertake rather than placing the burden on the speaker to justify the speech. This burden should require the employer wishing to restrain speech to first meet a rigorous "causation analysis test" requiring a close causal nexus be shown between the speech alleged to be harmful and the harm alleged to be suffered. Further, a government employer seeking to regulate speech should be required to demonstrate a "compelling state interest" in

limiting a public employee's expression and must be required to demonstrate that it utilized the "least-restrictive means" available to further its articulated interest. To this end, NELA urges this Court to adopt in public employment First Amendment cases a test akin to the "clear and present danger" causal nexus test enunciated by this Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Finally, NELA respectfully urges the Court to renew its long-held belief, as enunciated in *Pickering*, that opposition of a public employee to policies, practices or procedures of a public institution or a public official must not, standing alone, justify the abridgement of such speech, for allowing a government to retaliate against an employee because of mere "dissent" is tantamount to allowing a government to "pick and choose" among the ideas it wishes to reward or punish. NELA urges that governmental employers must be "viewpoint neutral" with regard to the First Amendment for without a "viewpoint neutral" strict causation test the employer will tend to slip surreptitiously into penalizing opinions and into fostering regulation of speech purely based on the subjective belief of the reactive disturbances it causes or may cause.

III. ARGUMENT

A. The Firing of a Public Employee for Uttering Speech Subjectively Deemed by a Public Employer to be "Insubordinate" is an Unconstitutionally Vague and Overbroad Infringement of the Employee's First Amendment Rights

More than 26 years ago, this Court found unconstitutional a state statute permitting the employment termination of a public employee for uttering "any treasonable or seditious word or words" or for engaging in any

"seditious act or acts." In so holding, this Court found the terms "treasonable" and "seditious" to be "dangerously uncertain" and that "dangers fatal to First Amendment freedoms" inhere in the application of such vague terms to the realm of public employment. *Keyishian v. Board of Regents*, 385 U.S. 589, 597-98 (1967). Further, this Court noted that the scope of these terms was so overbroad they could subjectively be interpreted by a governmental employer to have "virtually no limit." As such, a public employee could not "know where the line (was) drawn between 'seditious' and non-seditious utterances and acts." *Keyishian*, supra, 395 U.S. at 599.

In spite of this Court's holding in *Keyishian*, today another American stands before this Court with her public employment terminated because she asserted her constitutionally guaranteed right of free and open expression. The "sin" allegedly warranting the government's imposition of the "economic death penalty" upon Cheryl Churchill was that she spoke out on matters of the highest public concern, to wit: the health, safety, care, well-being and treatment of this nation's most valuable resource, its children. By criticizing the medical treatment infants in a state obstetrical facility were receiving, Cheryl Churchill sought to give voice to the voiceless within a government bureaucracy. For this, Cheryl Churchill was summarily fired even though the practices on which she had "blown the whistle" were practices that had put hospital patients at risk, violated state of Illinois nursing regulations, violated Hospital Accreditation Standards and violated professional nursing codes.[1]

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[1] See: *Churchill v. Waters*, 977 F.2d 1114, 1121-24 (7th Cir. 1992).

Cheryl Churchill, in the finest historical traditions of this country, is a heroine. The state, however, characterizes her "whistleblowing" as "unpleasant, uncooperative, negative and insubordinate" and uses those vague and overbroad standards to justify overriding her First Amendment rights.[2]

Allowing a government employer to unilaterally decide which speech of its employees it "believes *might* disrupt the office," "*might* undermine supervisory authority" and/or "*might* destroy close working relationships" is simply too vague, uncertain and subjective a standard on which to make contingent an American's constitutional right to freedom of expression. In fact, just as in *Keyishian*, such a "dangerously uncertain" standard has "virtually no limit" making it virtually impossible for a public employee to "know where the line is drawn" between what an employer may or may not deem to be appropriate, "insubordinate" and/or "disruptive" utterances. As such, the standard proposed by Petitioners would give unfettered authority to governmental supervisors to capriciously decide of which speech they would approve and not approve. NELA proposes, however, that a public employee's right of free expression cannot be made contingent on the capricious whims and sensitivities of a supervisor. In a free and open society a government must not unilaterally be able to restrain speech by simply referring to it as unpleasant, uncooperative, negative, disruptive, unprotected and/or not of a "public concern," for such a standard would place speech of public employees at the mercy of a capricious, authoritarian minority.

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[2] *Ibid.*, supra, at 1118-19.

B. The Public Has a Compelling Interest in Assuring a Public Employee's Right to Freedom of Expression Relating to Public Employment

1. Free Speech is an Indispensable Tool of Self-Governance in a Democratic Society

There is universal agreement that a major purpose of the First Amendment is to protect the free discussion of governmental affairs, including discussions of the structures, forms and manner in which government is operated or should be operated. *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).[3] For this and other reasons, this Court has previously ruled that government officials and institutions are afforded no greater immunity from criticism than other officials or institutions. *Bridges v. California*, 314 U.S. 252, 289 (1941).

NELA respectfully contends that interpretations by various district and appellate courts of *Connick* and *Pickering* severely infringe on a public employee's right to express opinions on such governmental matters, thereby establishing an inferior subclass of Americans who are prohibited by the capricious whims of their supervisors from speaking out on matters affecting the public weal. Simply put, NELA contends that even the "routine" operations of government institutions and the conduct of government officials are of such critical importance to the public well-being that they are matters of "public concern." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978). Therefore, NELA urges this Court rule that limiting a public employee's right to free speech may not be conditioned on whether a supervisor subjectively finds such speech to be "disruptive" and/or "insubordinate."

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[3] See also: R. Smolla, *Free Speech in an Open Society* (New York: Vintage, 1993), Ch. 1-4.

2. Restriction of a Public Employee's Speech Undermines Self-Governance and the Free Marketplace of Ideas Essential to a Democratic Society

Restricting free expression of public employees invidiously alters the democratic process and dramatically undercuts the basis for deferring to government policy. Speech is a means of participation, a way to stand up and be counted, a way to be an active player in a democracy. All citizens in a democracy, including public employees who comprise approximately one out of seven workers in the American workforce, have a participatory interest in freedom of speech, an interest which grows not only from the needs of the state but from the entitlement of the citizen.[4]

In the "marketplace of ideas," speech serves the pursuit of political "truth."[5] It is the "marketplace" metaphor which reminds us to take the "long view" of government, a "long view" that leads us to the conclusion that "truth" has a stubborn persistence and "truth" will ultimately prevail *if* combined with pragmatic measures to give it a fighting chance.[6] Therefore, if in the long run the "best test of truth" is the power of "thought" to gain acceptance in the competition of the market, then in the long run the "best test" of intelligent political policy is its

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[4] See: M. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 601-604 (1982); and S. Shiffrin, *Liberalism, Radicalism and Legal Scholarship*, 30 U.C.L.A. L. Rev. 1103, 1197-98 (1983).

[5] See: A. Meiklejohn, *Free Speech and Its Relation to Self Government* (Port Washington, NY: Kennikat, 1972, 1948).

[6] Smolla, p. 7. See also: P. Garry, *The American Vision of a Free Press* (New York: Garland, 1990); and F. Schauer, *Free Speech*, (New York: Cambridge Univ. Press, 1982).

power to gain acceptance of the polity.[7] Free speech serves this end by facilitating majority rule. It insures that collective policymaking represents, to the greatest degree possible, the collective will.[8]

Free speech restrains tyranny, corruption and ineptitude.[9] For most of the world's history, "the state" has presumed to play the role of benevolent, but firm, censor of speech on the theory that wise governance proceeds from the wise governance of opinions.[10] The "social compact theory" underlying this government seeks to counteract this tendency by recognizing that ultimate sovereignty always rests with "the people" who never surrender their natural right to protest when the state exceeds the limits of legitimate authority.[11] It is through "speech" that "the people" ferret-out corruption and discourage tyrannical excess, always striving to keep government within the metes and bounds of the charter to which "the people" first brought it into existence. Without such right, stability in government is sacrificed.[12]

In spite of the fact that free speech is critical to self-governance, Petitioners advocate before this Court only the most narrow protection of speech. They have, in effect, succumbed to government's inevitable willingness

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[7] Holmes, "The Path of Law," *10 Harv. L. Rev.*, 447, 446 (1918); And see: *Abrams v. United States*, 250 U.S. 616, 630 (1919).

[8] Bickel, *The Morality of Consent* (New Haven, CT: Yale, 1975).

[9] See: Blasi, "The Checking Value in First Amendment Theory," A.B.F. Res. J., pp. 521, 527-42 (1977).

[10] T. Hobbs, *Leviathan* (New York: Liberal Arts Press, 1958), Part II, Ch. 18.

[11] J. Locke, *The Second Treatise of Government* (New York: Liberal Arts Press, 1952).

[12] T. Emerson, *The System of Free Expression* (New York: Random House, 1970), pp. 6-9.

to play "censor" by urging this Court to effectuate a "supervisory reasonableness test" as a means of regulating speech. In making their argument, however, Petitioners presume that speech regulation, particularly as it pertains to supposedly "routine" governmental administration, is somehow of less importance than other "grander" matters. This ignores the reality that to some extent self-government is related to virtually all affairs of modern life. NELA urges, therefore, that if laws are to be enacted regarding all aspects of our culture, then it is vital for freedom of speech to extend to all aspects of all laws so enacted.

3. Restriction of Speech Denies the Expressive Spirit of Humankind

There is a dangerous mind set that permeates efforts to treat political speech alone as meriting exalted First Amendment status. This mind set sends the message that only speech deemed useful to the enterprise of government will be granted special protection by the government and it will be for the government to define what is useful.

In the instant case, the state attempts to obtain the moral entitlement to presume to dictate what is worth saying and when everything worth saying has been said.[13] This, however, cannot and must not become the law. To the public employee seeking to exercise free expression, it is critical that he or she be heard, even if only to either "dissent" or to "second" another's views.[14]

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[13] See: Smolla, p. 16.

[14] Accord: *Time v. Hill*, 385 U.S. 374, 388 (1967); *United Mine Workers v. Illinois Bar Association*, 398 U.S. 217, 223 (1967); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); and *Abood v. Detroit Board of Education*, 431 U.S. 209, 323 (1977).

While self-governance and marketplace theories "justify" free speech as a means to an end, free speech is also an end in itself; intimately intertwined with human autonomy and dignity.[15] The guarantee of free speech among public employees is "justified" by the elegantly-simple rationale that what speakers think or say should be decided by the speakers and not by governments. Speech is more than "just" a negative restraint on government, it both protects and provokes the expressive spirit. Beneath the surface lies a vexing voice, one that affirmatively encourages Americans to speak, to take "stands," to demand to be heard, to *participate*. One of these "stands" is expressed in the concept that humankind's search for "truth" is best advanced by a free trade in ideas.[16] Yet, free speech is valuable for reasons that have nothing whatsoever to do with the "collective search for truth" or the processes of self-government; it is a right defiantly, robustly and irreverently to speak one's mind just because it *is* one's mind.[17]

In spite of the necessity for freedom of expression, in all quarters speech is under attack from the very governmental institutions and officials sworn to preserve and defend it. Perhaps these bureaucrats *qua* autocrats view themselves as "defenders" of the system. However, if so, they should be reminded of the words of Justice Brandeis:

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[15] Accord: *Procunier v. Martinez*, 416 U.S. 396, 427 (1974). And see: L. Tribe, *American Constitutional Law*, 1st ed., (Mineola, NY: Foundation, 1989), p. 579.

[16] Smolla, p. 11. And see: J. Nowak, R. Rotunda, N. Young, *Constitutional Law*, § 16.6, 3rd ed. (St. Paul, MN: West Publishing Co., 1986), § 16.6.

[17] R. Smolla, *Suing the Press* (New York: Oxford Press, 1986), p. 257; and M. Nimmer, *Nimmer on Freedom of Speech* (New York: Matthew Bender, 1984) § 1.01-§ 1.04.

> Those who won our independence believed . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. *Whitney v. California*, 274 U.S. 357, 375 (1927). (Brandeis, J., concurring.)

4. The Public Has an Overarching Interest in the Nature and Quality of Its Public Services

a. The Public Has an Economic Interest in Open Government

As this Court indicated in *Elrod v. Burns*, 427 U.S. 347, 355 (1976), both the government and the public have significant interests in ensuring public agencies are effectively and efficiently run. Unfortunately, this has led, at least in some quarters, to the unfounded conclusion that

"efficient" government occurs only in hierarchial, autocratic environments where "dissent" is squelched in favor of "silence" and where "harmony" and "blind obedience" take precedence over speech. Nothing could be further from the truth. Instead, study after study has indicated that an efficient workplace is full of workers who speak their minds, question the status quo and dissent from presumptions previously considered inviolable. In the modern efficient workforce, a supervisor's "power" or "authority" is diminished *for the sake of efficiency* while "doers," such as teachers, nurses and doctors, are given far greater leeway, authority and power *to effectuate* the goals of the organization. Therefore, if the balancing of interest test is to be applied in First Amendment cases, NELA urges the Court to reaffirm the value of open and frank speech and to consider the loss to society in emphasizing "harmony" over "dissent." The power of the state to abridge free speech simply must be seen as the exception rather than the rule. *Herndon v. Lowry*, 301 U.S. 242, 258 (1937). NELA also urges the Court to reaffirm its position that no one is more likely to enhance the efficiency and effectiveness of our public agencies than the teachers, doctors, nurses and other public employees who work in them and who freely and firmly stand up to point out the inefficiencies in those organizations. *Pickering*, supra, 391 U.S. at 571.

The question of which countries will thrive as we enter the 21st century is dependent on who will produce the best products; who has the best skilled workforce; who *will organize the best*; and whose *governmental and educational* institutions will be the most efficient. These, in turn, are largely dependent on the nature and quality of the services "the public" will receive from its governmental agencies. Therefore, if this society is to prosper, state and federal institutions must focus on how they

may most efficiently make life better for the citizens of this country.[18] As such, the public has an interest in the appropriate management of its public institutions; an interest that is infringed when narrow First Amendment interpretations are levied on public employees preventing them from "dissenting" from inefficient governmental administration.

NELA respectfully contends that certain of the progeny of *Connick* and *Pickering* run afoul of the public's interest in workplace efficiency by allowing governmental authorities to capriciously limit full, open and free expression of "dissent" in governmental workplaces. In fact, studies now indicate that modern workplaces, including governmental entities, must be adaptive to rapid change.[19] In order to be "efficient," therefore, government supervisors must understand that new workforce realities are beckoning to be addressed. They must understand that skill requirements of an increasingly knowledge-based, service-oriented economy are reaching a "critical stage" and there is a "critical need" for professionals to enter the governmental workforce in greater strength if this country is to thrive.[20] As such, government supervisors must be made to understand the needs of this rapidly-changing professional workforce and not be allowed to autocratically limit "dissent" of the very

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[18] L. Thurow, *Head to Head* (New York: Warner, 1993), pp. 23-63, 122-25. And see: J.K. Galbraith, *The New Industrial State*, 4th Ed., XXIX (New York: Penguin 1986).

[19] W. Johnston and A. Packer, *Workforce 2000* (Indianapolis: Hudson Institute, Inc., 1987); J. Boyett and H. Conn, *Workplace 2000* (New York: Penguin, 1991).

[20] J. Fernandez, *Managing a Diverse Workforce* (Lexington, MA: Lexington Books, 1991); and D. Jamieson and J. O'Mara, *Managing Workforce 2000* (San Francisco: Jossey-Bass, 1991).

employees most needed to meet these changing needs.[21] Likewise, courts must be reminded that allowing or encouraging the restraint of speech of public employees is not only unnecessary to public agency efficiency, but it is actually counterproductive to the legitimate needs of government, a fact recognized by this Court 44 years ago when it said:

> . . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is never the less protected against censorship or punishment, unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest . . . There is no reason under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas . . . *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

As the "professionalization" of the governmental workplace increases, "doers" such as teachers, doctors and nurses must be allowed to take greater roles in controlling the workplace. Flexibility and creativity must be maximized and become more important than mere "endurance and loyalty."[22] "Dissent" must be seen as an

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[21] C. Stoner and L. Russell, "Creating a Culture of Diversity Management," working paper, Bradley Univ., Peoria, IL (1993).

[22] Boyett and Conn, Ch. 1.

effective and creative force in the workplace not to be stifled.[23] Information sharing, rather than authoritarian hierarchial decisionmaking, is the key to success.[24] "Conflict" must be seen to enhance organizational success by reducing tendencies toward complacency and "groupthink."[25] As such, governmental supervisors must adopt a "change agent" mentality.[26] They must understand that employees within their agencies need to be involved in "group decisionmaking" and that this will result in "intense interaction" between individuals.[27] They must also understand that in order to overcome bureaucratic

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[23] I.L. Janis, *Victims of Groupthink* (Boston: Houghton Mifflin, 1972), Ch. 9; I.L. Janis, "Problems of International Crisis Management in a Nuclear Age," *J. of Soc. Sci.*, Vol. 42, No. 2, 1986, pp. 201-220; I.L. Janis, "Groupthink," *Psychology Today*, November, 1971; J. Simmons and W. Mares, *Working Together* (New York: Knopf, 1983), p. 194; Bill Saporito, "The Revolt Against Working Smarter," *Fortune*, July 21, 1986, pp. 59-60; W. Bennis, *Changing Organizations* (New York: McGraw Hill, 1986), pp. 6-33, 64-80, 174-177; and W. Bennis, *American Bureaucracy* (U.S.: Aldine, 1970), pp. 165-187.

[24] Galbraith, Intro., 4th ed., Ch. VI-VIII and XIII; Boyett and Conn; K. Eisenhardt, "Agency Theory," *Academy of Management Review*, Vol. 14, No. 1, 1989, pp. 57-74.

[25] P. Nystrom and W. Starbuck, "To Avoid Organizational Crises, Unlearn," *Organizational Dynamics*, American Management Association, Spring 1984, pp. 53-65; K. Eisenhardt and L.J. Bourgeois, III, "Politics of Strategic Decision Making in High Velocity Environments," *Academy of Management Journal*, Vol. 31, No. 4., 1988, 737-770; K. Eisenhardt and C. Schoonhoven, "Organizational Growth," *Administrative Science Quarterly*, 35, 1990, pp. 504-529; Simmons and Mares; Bennis: *Changing Organizations* and *American Bureaucracy*. And see, I.L. Janis: *Victims of Groupthink*; and "Groupthink".

[26] Bennis: *Changing Organizations*; and *American Bureaucracy*.

[27] Galbraith, pp. 141-142.

inertia, they will *need* individuals to act as "disruption centers" constantly questioning the status quo.[28]

Success will flow to those who effectively open their workforce to a wide range of ideas, dissent, conflict and "disruption." Stifling creativity, information, dissent and/or feedback will merely lead to inefficient, counter-productive and corrupt government.[29]

Today, instead of maximizing "power" in the hands of a government supervisor to squelch dissent, in efficient workplaces "authority" must be redirected to the lowest level possible. For professionals, this occurs at the "doer" level.[30] "Doers," such as teachers, doctors and nurses, are simply in a better position to exercise judgment about operating problems than upper-level managers who know of a problem, if at all, only through delayed and much condensed reports. Governmental entities, however, have "bucked the trend" by routinely pushing discretionary authority "upwards" in the organization.[31] However, in order to be efficient, "prerogatives of status" must vanish, not so much to be replaced with workplace equality as to be replaced with recognition based on performance. Therefore, when considering the appropriate factors to be "balanced" in public employment First Amendment cases, NELA respectfully urges this Court to adopt the "long view" of government by emphasizing

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[28] Supra, notes 23-25.

[29] See: Nystrom and Starbuck; Eisenhardt and Bourgeois; (stifling dissent merely forces it "underground" where it negatively impacts on organizational performance); Boyett and Conn, (participatory management is an efficient way to cut overheads and raise productivity and reduces the "boss's power"); and Janis.

[30] Supra, notes 19-25.

[31] See generally: J. Wilson, *Bureaucracy* (U.S.: Basic Books, 1989), p. 133.

government efficiency through the maximization of employee freedom of expression over autocratic authoritarian rule.

Today, the simple truth is that because they are overly authoritarian and hierarchial, governmental entities are much less likely than private agencies to operate efficiently.[32] This, in turn, has lead to a huge loss of savings to the American public.[33] In fact, according to the 1984 Grace Commission report, over $400 billion in annual savings could be realized if federal government agencies were managed properly.[34] Were no such "costs" involved, one *might* argue that government "efficiency" would be irrelevant to a public employee First Amendment case. However, such costs make public entity management and the speech of public employees, such as Cheryl Churchill, a matter of "public concern." This is true even when the speech of the employee "merely" relates to internal agency efficiencies.

Others have also made the point that our public agencies are inefficient because they are too authoritarian. A panel of the National Academy of Public Administration (NAPA), consisting of sixteen senior government executives holding the rank of Assistant Secretary, issued a report coming to the same conclusion:

> Over many years, government has become entwined in elaborate management control systems

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[32] Wilson, pp. 349-351; Galbraith, Ch. VI and XI-XIII.

[33] J. Bendor, "Formal Models of Bureaucracy," *Brit. J. of Pol. Sci.* (1988), pp. 553-95; and Eisenhardt.

[34] *President's Private Sector on Cost Control* (New York: McMillan, 1984), known as the Grace Commission after its Chairman, J. Peter Grace. See also: General Accounting Office and Congressional Budget Office, *Analysis of the Grace Commission's Major Proposals for Cost Control* (Washington, D.C.: Government Printing Office, 1984).

and the accretion of progressively more detailed administrative procedures. This development has not produced superior management . . . Procedures overwhelm substance . . . critical elements of leadership in management appear to wither in the face of a preoccupation with process . . . Management systems are not management . . . The attitude of those who design and administer the rules . . . must be reoriented from a "control mentality" to one of how can I help get the mission of this agency accomplished.[35]

b. The Public Has a Social Interest in Speech Related to Efficient Government Operations

In addition to "efficiency," the government has other valued outputs as well. These include its reputation for integrity and its reputation for instilling confidence, but not false confidence, in the people it seeks to govern.[36] Such outputs are not enhanced, however, by stifling whistleblowers, gagging dissenters and punishing government employees whose only "sin" is that they sought to maximize organizational effectiveness, protect public safety and insure the public weal. Supervisors cannot expect that "blind obedience" is the equivalence of "harmony" or that a "harmonious" workplace is an "efficient" workplace. Efficiency, like democracy, is a boisterous and messy proposition; there is simply nothing wrong with a public employee suggesting that the "emperor has no clothes." Likewise, there is nothing wrong with a public employee yelling "fire" in a crowded theater if the

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[35] NAPA, *Revitalizing Federal Management* (Washington, D.C.: National Academy of Public Administration, November, 1983).

[36] Wilson, p. 317.

employee reasonably believes the theater to be on fire.[37] Restricting freedom of expression of our public employees dramatically limits said employees' ability to "blow the whistle" on expensive, inefficient, unsafe and/or unresponsive government. This, in turn, dramatically impacts on the public's ability to "believe in" its institutions. Therefore, such limitations on public employees' ability to speak freely must not be allowed to prevail. As such, NELA respectfully urges this Court to reaffirm that speech must be maximized rather than limited by vague, overbroad and anti-democratic speech restrictions.

C. Interpretations of the Balancing of Interest Test Enunciated in *Connick v. Meyers* Appear to Invite, if Not Justify, Attempts to Encroach on the Guarantees of Free Speech

1. Emphasis on the Subjective Beliefs of Supervisors Devalues Speech

A society that wishes to remain open and free must not merely "allow" its citizens a wide range of expressive freedom, but most go further to encourage the opening of the deliberative processes of government to the light of public scrutiny. "Censorship" is a social instinct and open government does not come easily. As such, a society that values "openness" must devise rules that are deliberately tilted in favor of speech in order to counteract the inherent proclivity of governments to engage in control.[38]

NELA maintains that the initial inquiry in this case, or any other public employment First Amendment case, must not be *whether* a public employee's speech is

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[37] *Pickering*, supra, 391 U.S. at 574.

[38] Smolla, *Free Speech in an Open Society*, pp. 3-42; and F. Haiman, *Speech and Law in a Free Society*, (Chicago: Univ. of Chicago Press, 1981) pp. 297-339, 369-409.

"appropriate" but, rather, *who* will decide what speech is appropriate. NELA also maintains in an open society that decision must rest with the speaker and not with governmental officials, high or petty.[39]

A review of *Connick's* and *Pickering's* progeny demonstrates, on the whole, that the application of the balancing approach enunciated in those cases has tended, in general, to have resulted in relatively low protection of speech.[40] One reason for this is that when the balancing test has been employed by many of this nation's courts, speech has tended to have been devalued as "just another social interest" to be thrown in the mix. This may be seen in the instant case where the district court succumbed the "dark underside" of balancing. Conversely, insightful decisions such as that rendered by the appellate court herein strike the right chord by emphasizing that freedom of speech must be treated as a "preferred societal value" and must be maximized.

There are a number of negative impulses endemic to speech "balancing tests" that warrant ongoing suspicion of the integrity and wisdom of allowing such balancing to continue unfettered. Governmental entities have an inexorable inclination to undervalue free speech interests and to overvalue other interests that come into conflict with speech. Censorship, not openness, is the reflexive first instinct of government.[41] Rules and regulations restricting free speech are particularly prone to be infected by

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[39] Accord: *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). And see: Smolla, *Free Speech in an Open Society*, pp. 3-5, 12.

[40] See, e.g.,: *Versage v. Township of Clinton, New Jersey*, 984 F.2d 1359 (3rd Cir. 1993); *Marquez v. Turnock*, 967 F.2d. 1175 (7th Cir. 1992); and *Propst v. Weir*, 937 F.2d 338 (7th Cir. 1991).

[41] See generally: Smolla, *Free Speech in an Open Society*, Ch. 1-4; Galbraith, Ch. VI, XIII and XXXIV; and Wilson.

prejudice or paranoia and driven by short-term rather than long-term thinking.[42] Furthermore, the "perceived evils" that motivate governmental entity implementation of anti-speech rules tend to appear more viscerally and immediately commanding than the long-term, theoretical abstractions supporting free speech.[43]

In this environment, the marketplace of ideas, the self-fulfillment of the speaker and the role of speech in self-governance are often seen as "just theories" to be snickered at, like so many empty banalities, as bureaucratic decisionmakers calculate the costs and supposed benefits of their short-term interests. Applications of this Court's balancing tests tend to overlook the frailties of free speech by ignoring the anatomy of censorship. The human instinct to censor thrives, creating an irrepressible conflict with the human instinct to speak. Outrage, self-righteousness and paranoia feed the maw of censorship. Squelching speech drives it underground, where it festers into more dangerous hysterias. In words of Justice Brandeis, "Men feared witches and burnt women." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J. concurring.)

2. Emphasis on "Disruption" in the Public Workplace Devalues Speech

Allowing government unilaterally and subjectively to decide which speech it "believes *might* disrupt the office," "*might* undermine supervisory authority" and/or "*might* destroy close working relationships" ignores the realities of the modern efficient workplace by emphasizing costly

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[42] Supra, notes 23-25; J. Nowak, et al., *Constitution Law*, 1st ed. (St. Paul, MN: West 1978), Ch. 18; and Bendor.

[43] *Ibid*. And see *Abrams*, supra.

and unduly authoritarian leadership over creative feedback. The *Connick* rule has given the green light to those authoritarian voices who wish to maximize "bureaucratic process" over output, fear over efficiency and subordination over engaged cooperation. Further, the *Connick* balancing test has often been applied so as to encourage employers to mistake passivity for cooperation, blind obedience for efficiency and open discussion for "disruption." The pendulum has simply swung too far in favor of autocratic supervisors and needs to swing back toward the middle in favor of speech.

As in many similar organizations, among governments an attitude often exists which values means over ends, leaving supervisors often worrying more about "blind obedience" than about achieving the ultimate goal of the organization.[44] Because of this, they are often more preoccupied with finding ways of "controlling" exactly what their employees do rather than effectuating desired organizational outcomes. This, in turn, has lead to inefficient and costly government, a trend which must not be encouraged in free speech cases.[45]

Decentralized, less autocratic management "works" in the modern workplace in part because "professional" members are influenced by external reference groups of fellow professionals who prescribe "professionalism" standards. Physicians and nurses, for example, are responsive to such "professional" standards. Such persons are expected by their professions to put the well-being of their clients and the search for truth above their own narrow interests. Society invests heavily in their training, in part because clients of professionals, such as

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[44] Wilson, pp. 22-33; and R. Merton, "Bureaucratic Structure and Personality," *Social Forces*, (1940); pp. 560-68.

[45] See: K. Eisenhardt; and Wilson, pp. 164, 357.

medical patients, are unable to adequately evaluate the quality of the procedures to which they are subjected.[46] The need, therefore, for highly bureaucratized management stifling creativity, feedback, "dissent" and/or "conflict" is minimal and should not be reinforced in First Amendment cases by giving managers unfettered authority to limit speech.

Teachers, doctors, nurses and other public employees bring to their agencies not only their skills, but also their professional standards. Therefore, government agencies simply cannot hire them and utilize them as if they are unthinking tools. Black & Decker may make tools, but Harvard and Notre Dame do not.[47] Instead, worker peer groups set expectations to which "doers" must conform, especially when such professionals work in a threatening, unpredictable or confrontational environment such as a hospital. Further, "disruption" is kept in check by strong social and psychological pressures which keep employees from acting contrary to the goals of their organizations and their leaders. The simple fact of human nature is that workers have a much stronger inclination to "obey" supervisors than to disobey.[48] In fact, pressures to conform to the status quo are so great that instead of worrying about "disruption," many supervisors must instead seek to enhance and encourage "disruption" and dissention.[49]

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[46] Wilson, p. 149.

[47] Wilson, p. 371.

[48] S. Milgram, *Obedience to Authority* (New York: Harper & Row, 1974), Ch. 1 and 9; S. Milgram, "Behavioral Study of Obedience," *J. of Abnormal and Social Psychology* Vol. 67, No. 4, 1963, pp. 371-78; and supra, notes 24 and 26.

[49] Supra, notes 24-26, 34 and 45.

NELA respectfully urges this Court to render a decision in this case which considers the true economic and social costs to this country in preventing people who are most engaged in government from speaking out on matters of "public concern," including the economics, safety, health, efficiency, policy and administration of the agencies in which they work. These employees must be allowed to speak out even if it means said employees might be seen as "dissenting" from management decisions or seen as challenging their supervisor's decisions or engaging in what some supervisors might call uncooperative, negative and/or "disruptive" behavior.

In spite of this need for "engagement" in the workplace, applications of the *Connick* disruption analysis indicate a perception exists in some courts that government employees are "nay sayers" and that government agencies have had to "put up" with overly negative employees who, if left to their own devices, would destroy the ability of our public agencies to function. Such perceptions, however, are simply unfounded. Instead, contrary to prevailing folklore, governmental employees are not invariably a collection of "nay sayers"; they are all too often "yea sayers."[50] This can have tragic consequences if such attitudes serve to squelch dissent, leaving government unchecked and unchallenged.

One example of such unfounded and unchecked optimism may be seen in the January, 1987 Space Shuttle Challenger disaster. According to the Rogers Commission Report, the National Aeronautics and Space Administration (NASA) was imbued with an overly optimistic attitude that reflected a belief it could "do anything." The Rogers Commission later wrote, however, that NASA's "can do" attitude ultimately and dramatically interfered

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[50] Supra, notes 23-25 and 48.

with "the mission" by stifling the reservations, dissent and constructive criticisms of the project engineers.[51] In fact, one NASA engineer testified that he did not express safety concerns because he had previously been "personally chastised" and "crucified" by his supervisors for raising design objections.[52] This testimony confirmed the Rogers Commission's findings that supervisors had "dominated" their subordinates and that this "domineering" management style went a long way towards explaining the shuttle disaster. What the Challenger disaster vividly indicates, then, and what contemporary organizational studies urge, is that government organizations must not stifle the voices of dissent within their ranks. Blind, obedient subservience and "group harmony" may be a prescription for disaster.

If we are to prosper as a free and open society, government employees must be allowed to step forward and express their concerns, even if those concerns affect their own employment situations. There simply is no way to separate "public" concern from "private" concerns. NELA submits, however, that appellate and district courts have interpreted *Connick* in such a way as to establish an *ad hoc* First Amendment rule leaving it to chance whether a public employee may engage in dissent at the workplace.

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[51] Presidential Commission on the Space Shuttle Challenger Accident, Report to the President (Washington, D.C.: U.S. Government Printing Office, 1986), known as the Rogers Commission Report after its chairperson, William P. Rogers, pp. 171-72, 199-201.

[52] Quoted in McConnell, *Challenger: A Major Malfunction* (Garden City, New York: Doubleday, 1987) p. 1987. See also: J. Trento, *Prescription for Disaster* (New York: Crown, 1987), Ch. 10-11.

Currently one might ask what advice an attorney could give to a hypothetical engineer who wanted to "blow the whistle" on unsafe practices at some governmental entity such as NASA. NELA contends that under many current legal interpretations of *Connick* and *Pickering*, the attorney would probably have to tell the employee that such speech might not be considered to be of a public concern; particularly if the employee had previously been disciplined a time or two for failing to keep quiet about actual or perceived safety deficiencies. Further, the attorney would have to advise that even if the matter were of a "public concern," under the progeny of *Connick* if the employee persisted in "dissenting," the employee's supervisor could well describe him or her as "disruptive." In fact, it would appear that the more the employer overreacted to the "dissent," the more the employer could later claim the employee was "disruptive."

The attorney would also have to advise of the doctrine of qualified immunity; that is, that the employee could possibly be prohibited from bringing an action against the supervisor who violated his or her rights because no previous case had ever been reported which was sufficiently factually close to that faced by the employee. Therefore, the supervisor might later successfully claim that he or she had not acted in reckless disregard of existing case law. As such, qualified immunity has the effect of "freezing" First Amendment law at some pre-*Connick*, pre-*Pickering* time period. The bottom line, therefore, would be that the attorney would have to advise the NASA engineer of the combined effects of qualified immunity, *Pickering*, et al., and *Connick*, et al., and advise the client of the consequences that such narrow interpretations could impose on the ability of the

public employee to speak out. NELA respectfully contends that such a "bottom line" is simply unconscionable and the "dangerous uncertainty" raised by overly narrow judicial interpretations of *Connick* and *Pickering* must cease.

In this day and age, employment discussions which supposedly apply to "just one person" clearly implicate and touch on the public good. To limit such speech, therefore, not only runs contrary to the direction of contemporary organizational management, but it also binds, gags and tramples the First Amendment. This Court, therefore, must give firm direction that the "pendulum" has swung too far in favor of government and must now swing more in favor of speech. Government supervisors who are often the subject of a public employee's free expression of dissent simply must not be allowed, *sua sponte*, to define the parameters of the First Amendment. To do so would be to ignore the realities of human nature.[53] It would allow supervisors to use vague and overbroad terms such as "insubordination" as *in terrorem* mechanisms impermissibly limiting and squelching free expression. In a free, open and democratic society this is intolerable, particularly when it is essential to the public good that such authoritarianism practices cease.

IV. CONCLUSION

The Petitioners herein offer beguilingly sympathetic arguments in their Orwellian quest to have this Court overturn the well-reasoned decision of the Seventh Circuit. In so arguing, however, Petitioners have stood rationality on its ear. They would have this Court pronounce that free expression of the public well-being is dissent;

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[53] Nystrom and Starbuck; Janis, *Victims of Groupthink*; Janis, "Groupthink"; Milgram.

that dissent is disruption; that disruption is anarchy; and that professionalism is insubordination. They would have this Court pronounce that there is an "important governmental interest" in squelching nearly any expression of dissent by a public employee within the public employment sector if a supervisor *might* be offended by it. They would also have this Court believe that public officials have a monopoly on vision, wisdom and authority relative to the public weal. They would have this Court command that when public officials speak, they speak *ex cathedra*, and that henceforth their pronouncements are not subject to evaluation, reevaluation, discussion or dissent. They would, in effect, have this Court mandate that public nurses such as Respondent must violate the most sacred tenets of their profession to "do no harm" if they wish to be free of the wrath of governmental supervisors. Such arguments cannot, and must not, constitute the law of this land.

NELA contends that if the balancing of interests approach is to continue to be utilized in public employee discipline cases, the unequivocal language of the First Amendment must be interpreted so as to place the burden on governments to justify any encroachment of free expression they may wish to impose rather than placing the burden on the speaker to justify the speech.[54] This burden must require a government wishing to restrain speech to first meet a rigorous "causation analysis test" requiring that a close causal nexus be shown between the speech alleged to be harmful and the harm alleged to be suffered. Further still, a governmental employer seeking

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[54] Accord: *Elrod*, supra; *Perry v. Sindermann*, 408 U.S. 593 (1972); and *Rutan v. Republican Party*, 497 U.S. 62 (1990). See also: S. Shiffrin, *The First Amendment, Democracy and Romance* (Cambridge: Harvard Univ. Press, 1990).

to regulate speech must be required to demonstrate a "compelling reason" to limit a public employee's free expression and must be required to demonstrate that it utilized the "least-restrictive means" available to further its articulated interest.[55] To this end, NELA urges this Court to adopt in First Amendment public employment cases a test akin to the "clear and present danger" causal nexus test enunciated by this Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

"Opposition" of a public employee to the policies, practices or procedures of a public institution or a public official must not, standing alone, justify the abridgement of such speech, for allowing a government to terminate an employee because of mere "opposition" is tantamount to allowing a government to "pick and choose" among the ideas it wishes to reward or punish. Governmental employers must, therefore, be "viewpoint neutral" with regard to the First Amendment so as to protect conscientious public servants such as Cheryl Churchill. Without a "viewpoint neutral," strict causation test, governments will tend to slip surreptitiously into penalizing opinions

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[55] Accord: *Sable Communications of California, Inc. v. FCC*, 109 S.Ct. 2829, 2836 (1989); and *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

and into fostering regulation of speech purely because of the reactive disturbances it causes or may cause.[56]

Respectfully submitted,

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[56] Accord: *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 806 (1985); and *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46, 49, n. 9 (1983). See also Post, *Between Governance and Management*, 34 U.C.L.A. L. Rev. 1713, 1824 (1987). And see: Smolla, *Free Speech in an Open Society*, Ch. 3; K. Greenwalt, *Speech, Crime and the Uses of Language*, (New York: Oxford Univ. Press, 1986), pp. 80-126; J. Mill, *On Liberty*, 1859); Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519 (1979).